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THE PRACTICE

DOJ Relents on False-Statements Policy

Investigators trap suspects in lies and then use threat of prosecution to extract evidence, convictions.

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In 1998, Justice Ruth Bader Ginsburg warned that the federal false-statement statute (18 U.S.C. 1001) gives prosecutors power to manufacture crimes. Agents having trouble making a case against a suspect can ask a question to which they already know the answer; if the suspect responds falsely, the agents can use his answer as leverage to gain cooperation or as a substitute for the offense the agents could not prove. Because no oath is required and interviews typically occur under informal circumstances, investigators can lay a trap and often a suspect will walk right into it.

The Department of Justice has just made it a little harder to use § 1001 in this fashion. On March 10, the department told the U.S. Supreme Court that it now interprets the "willfully" element of § 1001 to require proof that the defendant knew his conduct was unlawful. The department announced its new view in briefs opposing certiorari in two cases, *Ajoku v. United States* and *Russell v. United States*, involving convictions under a special false-statement statute, 18 U.S.C. 1035, that was modeled on § 1001 and prohibits a wide range of false statements relating to medical care.

SPLIT AMONG THE CIRCUITS

Only the U.S. Court of Appeals for the Third Circuit has held that § 1001 requires knowledge of unlawfulness, although jury instructions in the Second and Seventh circuits have usually set forth a similar requirement. Seven circuits—the First, Fourth, Fifth, Eighth, Ninth, Tenth and D.C. circuits—have said it does not matter whether the defendant was aware he was acting illegally; knowledge of falsity and deliberateness are sufficient. Now that the government has endorsed the Third Circuit's interpretation, most circuits are likely to adopt it. If so, the Justice Department will have

helped ameliorate an aspect of federal criminal law that can produce palpable unfairness.

The key portions of § 1001 were enacted during the New Deal, to allow prosecution of false statements concerning the wages paid to persons working on public works projects or oil shipped in excess of state quotas. The statute would soon be used in cases against alleged subversives as well. One such prosecution led to a key ruling in 1948 by the D.C. Circuit that the law applies to oral and not just written statements. Although the Supreme Court split, 4-4, in that case, a few years later it embraced the D.C. Circuit's view. Eventually, § 1001 became one of the federal statutes that prosecutors most frequently charge or threaten to charge. They sometimes bring false-statement charges when no other crimes can be proven, but they also often add such charges to substantive charges, to maximize the chance of a compromise verdict of guilty on at least one count.

Beginning in the 1950s, a number of courts sought to limit application of § 1001 in cases involving oral statements made in criminal and other investigations. Many judges concluded that it made no sense to impose liability under a statute permitting a sentence as long as the sentence for perjury, without an oath or any of the other safeguards in perjury prosecutions, when a citizen answers a question falsely rather than incriminate himself. Pursuant to the "exculpatory no" doctrine, authority developed that, in some circumstances, statements merely denying wrongdoing are outside the reach of § 1001.

In 1984, Justice William Rehnquist wrote for three other justices that § 1001 should apply only when the defendant knows he is acting in a matter within the federal government's jurisdiction. Five justices read the statute differently, however, and concluded that such knowledge is unnecessary.

'BROGAN V. UNITED STATES'

Fourteen years later, the Supreme Court flatly rejected the exculpatory no doctrine in *Brogan v. United States*. Speaking through Justice Antonin Scalia, the court found that the words of § 1001 leave no room for that doctrine. Justices John Paul Stevens and Stephen Breyer dissented. Ginsburg, joined by Justice David Souter, concurred in the judgment, emphasizing that the majority's ruling permits "an overzealous prosecutor or investigator—aware that a person has committed some suspicious acts, but unable to make a criminal case—[to] create a crime by surprising the suspect, asking about those acts, and receiving a false denial." Ginsburg invited Congress to fix the statute and noted that it remained unresolved whether a person could be convicted under § 1001 if the person did not know it was unlawful to make a false statement.

Although Congress did not accept Ginsburg's invitation, in another case decided later in 1998, in which a defendant was charged with "willfully" dealing in firearms without a federal license, the Supreme Court said that, in general, a willfulness element of a criminal statute requires proof the defendant knew his conduct was unlawful. That decision, *Bryan v. United States*, was written by Stevens. The court repeated the same point in a 2007 opinion by Souter.

It has taken a long time for *Bryan* to have much effect in false-statement prosecutions, but now that the Justice Department has concluded that the *Bryan* presumption indicates the proper construction of "willfully" in § 1001, courts presumably will re-examine their interpretations. Agents may seek to neutralize the effect of requiring knowledge of unlawfulness by asking the person they are interviewing to sign a form stating that he understands it is illegal to knowingly provide false information.

Still, the department deserves credit for taking a step to limit the statute. The department or Congress should also bar false-statement charges when there is no contemporaneous, verbatim and reliable record of what the defendant said, what he was asked and what he was told about any form that he signed.

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